Supreme Court, U.S.
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No. 98-1456

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

RODNEY J. AHITOW,

Petitioner,

v.

JAMES P. GLASS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Barry Levenstam*
Kendra S. Collier
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

*Counsel of Record

Counsel for Respondent

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STATEMENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent James P. Glass, by his counsel Barry Levenstam, Kendra Collier, and Jenner & Block, respectfully suggests that this Court deny the Petition for Writ of Certiorari for Case No. 98-1456. Contrary to the State's contention, the Seventh Circuit's decision regarding Mr. Glass in the consolidated case of *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998), concerning the statute of limitations set forth in 28 U.S.C. § 2244(d) is *not* "clearly erroneous, and in contravention of how the majority of the Circuit Courts of Appeal . . . including the Seventh Circuit," have interpreted the statute of limitations. (Ptn. 7.) Rather, the decision below is consistent with the decisions of other courts of appeals and does not conflict with other Seventh Circuit decisions. The Seventh Circuit's holding provides clear guidance for fairly applying the statute of limitations that Congress imposed upon habeas corpus petitions under 28 U.S.C. § 2254 -- rather than resorting to a judicially created "grace period." Furthermore, the court's holding is in complete accord with this Court's decision in *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997). This case therefore would present no basis for this Court's review even if the underlying issue weren't one that is bound by its very nature to disappear completely in very short order due solely to the passage of time.

ARGUMENTS FOR DENYING THE WRIT

Chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") applies to this case because Mr. Glass filed his 28 U.S.C. § 2254 habeas petition

after April 24, 1996, the effective date of the AEDPA. *See Lindh v. Murphy*, 117 S. Ct. at 2068 (holding that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective). The Seventh Circuit's reliance upon this Court's decision in *Lindh* is not misplaced, as the State claims. *Lindh* held that Congressional intent dictates that the new provisions of the AEDPA do not apply to pending cases, but only to those cases filed after the Act became effective. *See* 117 S. Ct. at 2064-66. The Seventh Circuit's "conclu[sion] that Congress intend[ed] for most of the AEDPA provisions to apply only to cases filed after April 24, 1996," *Gendron*, 154 F.3d at 675, including the statute of limitations in Section 2244, is thus perfectly consistent with, and supported by, this Court's decision in *Lindh*.

This Court did not expressly state in *Lindh* when the Section 2244(d) statute of limitations should commence to run for petitioners whose convictions became final before Congress enacted the AEDPA. It is not inconsistent, therefore, for the Seventh Circuit to conclude that the one year limitations period set forth in 28 U.S.C. § 2244(d) begins to run on the date of the AEDPA's enactment. Certainly nothing in this Court's *Lindh* decision suggests that the Seventh Circuit's application of Section 2244(d) is in error. If anything, this Court's decision that the new provisions of the AEDPA should apply prospectively strongly suggests that it would *not* read Section 2244(d) to shorten a prospective petitioner's time for filing a habeas corpus petition by the period of time that expired from the time the prospective petitioner's judgment of conviction became final to the date the AEDPA became effective.

Indeed, the Seventh Circuit's conclusion is consistent with its own *en banc* ruling in *Lindh*, prior to this Court's decision. Specifically, the *en banc* Seventh Circuit stated:

> [A]lthough no decision of the Supreme Court addresses the question directly, we do not doubt that the Court would give a plaintiff who files after the enactment a reasonable post-amendment time to get litigation underway.

Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996) (*en banc*), *reversed on other grounds*, 117 S. Ct. 2059 (1997). At that time the Seventh Circuit correctly recognized the utility of the statute's one-year period, and essentially adopted it despite mistakenly concluding that the courts otherwise should apply the AEDPA retroactively:

> Section 2244(d) is short enough that the 'reasonable time' after April 24, 1996, and the one-year statutory period coalesce; reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed under § 2244(d).

Id. The very fact that this Court took no issue with the Seventh Circuit's prognostication on this point when subsequently reviewing that court's decision in *Lindh* lends considerable support to that aspect of the *en banc* opinion.

The State argues that the "reasonable time" language in the Seventh Circuit's *Lindh* opinion, which some lower courts have termed a "grace period,"[1/] undercuts, and is inconsistent with,

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1/ *See, e.g., United States ex rel. Starks v. O'Sullivan*, No. 97 C 3246, 1998 U.S. Dist. LEXIS 14476, at *4 (N.D. Ill. Sept. 10, 1998) ("[T]he Seventh Circuit has provided a one-year grace period in applying § 2244(d)(1)"); *see also United States ex rel. Martinez v. DeTella*, No. 97 C

the Seventh Circuit's decision in this case that the statute of limitations begins to run on April 24, 1996. (Ptn. 8-9.) That is not so. Although the Seventh Circuit in *Lindh* expressly prohibited dismissal under Section 2244(d) of a collateral attack filed by April 23, 1997, it did not hold that any collateral attack filed after April 23, 1997 *must* be dismissed.

Furthermore, the Seventh Circuit did not address in *Lindh* whether the one-year "reasonable time" period it borrowed from Section 2244(d) included with it the exemption for pending state post-conviction proceedings that Congress placed in 28 U.S.C. § 2244(d)(2).

The State's argument is flawed because it fails to take the context of the Seventh Circuit's original *Lindh* holding into account. In *Lindh*, the Seventh Circuit held that the AEDPA was to be given retroactive effect. 96 F.3d at 865. The court therefore had to create, essentially out of whole cloth, what the State calls the "grace period" to save that statute. As the Seventh Circuit correctly noted in its *Lindh* decision:

> A prisoner's decision to defer filing -- perhaps while doing legal research, or while waiting for the Supreme Court to decide a case that could influence the selection of issues -- is the sort of event to which the amended statute would 'attach new legal consequences.'

Id. After this Court reversed the Seventh Circuit's retroactivity conclusion, however, the so-called "grace period" would only

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3319, 1997 U.S. Dist. LEXIS 16524, at *3-*4 (N.D. Ill. Oct. 16, 1997) ("In *Lindh*, the court created a one-year 'grace period' for habeas petitioners whose claims would otherwise be foreclosed by the terms of the Act."). The Seventh Circuit, however, did not use the term "grace period."

be necessary if a court interpreted the Section 2244(d) one year period to have retroactive effect, so that a would-be petitioner could find himself barred by Section 2244(d) on the day it became effective.

Another problem that disappears with the *Gendron/Glass* approach is the confusing interplay between the judicially-created "grace period" and Congress's Section 2244(d) statute of limitations. Certainly the better result is to give Section 2244(d) a prospective reading, as the Seventh Circuit has done here and as the Tenth Circuit plainly did in *Hoggro v. Boone*, 150 F.3d 1223, 1225-26 (10th Cir. 1998).[2/] This eliminates the need for engrafting onto the statute a judicially-drafted "grace period," and further eliminates the need for analyzing confusing -- and unnecessary -- issues about the interrelationship between the so-called "grace period" and the actual statute of limitations provided by Congress in Section 2244(d), including the Section 2244(d)(2) tolling provision.

Furthermore, the Seventh Circuit's prospective reading of Section 2244(d) most likely comports with Congress's intent. If Congress had wanted a "grace period," it could have created one; the fact that Congress did not strongly suggests either that it intended that courts would apply the one year period prospectively only, or that it simply did not think of the

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2/ Contrary to the State's argument, the Tenth Circuit's conclusion in *Hoggro* is not inconsistent with that court's earlier holding in *United States v. Simmonds*, 111 F.3d 737 (10th Cir. 1997). (Ptn. 9 n.4.) In *Simmonds*, the court held that the one year limitations period of Section 2255 constituted a reasonable time for prisoners to bring Section 2255 motions. *See id.* at 746. *Simmonds* did not address the salient issue in *Hoggro* - the relationship between a Section 2254 habeas petition and the limitation period/tolling provision of Section 2244(d).

problem. (As this Court said in *Lindh*, "[a]ll we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." 117 S. Ct. at 2068.) In either event, the simple expedient of using the statute of limitations that Congress provided in Section 2244(d) prospectively will guarantee that no one is deprived retrospectively of time to file their petition, while avoiding a gaggle of problems caused by interjecting a judge-made "grace period" into a well-defined limitations/tolling statute.

The State contends that if the statute of limitations provided for in 28 U.S.C. § 2244(d)(1)(A) had been determined to begin on April 24, 1996, there would have been no need for the Seventh Circuit and other courts like *Burns v. Morton*, 134 F.3d 109 (3d Cir. 1998); *United States v. Flores*, 135 F.3d 1000 (5th Cir. 1998); *Brown v. Angelone*, 150 F.3d 370 (4th Cir. 1998); *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998); and *United States v. Simmonds*, 111 F.3d 737 (10th Cir. 1997), to have adopted a grace period at all. (Ptn. 9.) In *Burns*, the Third Circuit, like the Seventh Circuit in *Lindh*, did not state that it was adopting a "grace period." It simply held that to avoid impermissible retroactive application of the AEDPA, "habeas petitions filed on or before April 23, 1997, may not be dismissed for failure to comply with § 2244(d)(1)'s time limit." 134 F.3d at 111. The *Burns* case, like *Lindh* and the other cases cited by the State, did not require the court to address the specific issue raised in this case because the petitioner had filed his petition *before* April 23, 1997. Only *Calderon v. United States Dist. Court*, 128 F.3d 1283 (9th Cir. 1997), is different. In *Calderon*, the petitioner filed his petition after April 23, 1998, but did not have pending state post-conviction proceedings to toll the statute. The court in *Calderon*

nevertheless equitably tolled the statute of limitations because the petitioner's attorney had withdrawn. *See id.* at 1289. The *Calderon* court concluded, as did the Seventh Circuit in the underlying decision, that the "AEDPA's one-year time limit did not begin to run against any state prisoner prior to the statute's date of enactment." *Id.* at 1287. As a statute of limitations, the *Calderon* court held that the Section 2244(d) one year period was presumptively subject to equitable tolling. *See id.* at 1289.

Mr. Glass's case, however, required the Seventh Circuit to discern the difference between the so-called "grace period" and the actual statute of limitations, and to address how the statute works. Because Mr. Glass had a proper post-conviction petition pending in the Illinois courts when the AEDPA was enacted, the tolling provision of 28 U.S.C. § 2244(d)(2) applied. The AEDPA does not expressly provide an exception to the tolling provision in 28 U.S.C. § 2244(d)(2) for cases in which the judgment of conviction became final before April 24, 1996, and the State advances no argument why the courts should create one.

To the contrary, as would-be habeas petitioners whose state post-conviction proceedings have extended from before to after the effective date of the AEDPA turn to the habeas statute to assess when to file -- and many, like Mr. Glass, will do so pro se -- it will not be clear to them that this new statute counts against them the time that passed before Congress enacted it. For that reason as well, the Seventh Circuit's ruling in this case provides the proper approach to this statute: "[W]e insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). *See also Kolender v. Lawson*, 461 U.S. 352, 357-58

(1983) (describing the necessity of statutory definiteness so not to encourage arbitrary and discriminatory enforcement and so ordinary people can understand what conduct is prohibited). Further, fair notice:

> obviously carries great import when limiting the time afforded a prisoner to seek a writ of habeas corpus, the 'fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.'

Brown v. Angelone, 150 F.3d 370, 375 (4th Cir. 1998) citing *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

The Seventh Circuit's decision in the case at bar is not inconsistent with the holdings in any other Seventh Circuit decision. Both *O'Connor v. United States*, 133 F.3d 548 (7th Cir. 1998), and *Young v. United States*, 124 F.3d 794 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 2324 (1998), involved a petition filed within one year after the AEDPA became effective. Furthermore, both of these cases arose in the context of 28 U.S.C. § 2255, a context that obviously presented no issues of how to treat time that elapses during state post-conviction proceedings. Consequently, if the petitioners in *O'Connor* and *Young* had not filed by April 23, 1997, their petitions would have been barred because the statute of limitations for proceedings in 28 U.S.C. § 2255 does not contain any tolling provision. *See Hoggro*, 150 F.3d at 1226. In Section 2254 cases, unlike Section 2255 cases, the statute of limitations provided by Congress will differ from the judicial *Lindh* "reasonable time" rules because "Congress has explicitly instructed the federal courts - through § 2244(d)(2) - to toll time spent in state court." *Hoggro*, 150 F.3d at 1226.

The State maintains that the proper analysis of this issue is found in the cases *Brown v. Angelone*, 150 F.3d 370 (4th Cir. 1998), and *United States v. Flores*, 135 F.3d 1000 (5th Cir. 1998). (Ptn. 11.) Contrary to the State's contention, neither of these cases employed a "grace period." Instead, they followed *Lindh's* reasoning in holding that one year after the AEDPA's effective date was a reasonable period within which petitioners may file. *See Brown*, 150 F.3d at 374-76; *Flores*, 135 F.3d at 1005-06. It is entirely consistent that the "reasonable time," or "reasonable period" adopted by these courts, which coalesces with the statutory period of one year, *Brown*, 150 F.3d at 375, be subject to the tolling provision set forth in Section 2244(d)(2).

At least three courts of appeals have held that Section 2244(d)(1) is not a jurisdictional bar, but a statute of limitations that begins to run on the date of the statute's enactment and is subject to equitable tolling. *See Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 210 (1998); *Calderon*, 128 F.3d 1283, 1287-89 (9th Cir. 1997). Although none of the petitioners in those cases had pending state post-conviction proceedings, a logical extension of equitable tolling is the application of the statutory tolling period to the appropriate case. If courts have been willing to find that Congress intended the one year period to function as a statute of limitations, subject to equitable tolling, than surely the same statute of limitations should be subject to Congress's explicit instructions that:

> The time during which a properly filed application for state post-conviction or other collateral review . . . shall

not be counted toward *any period of limitation* under this subsection.

28 U.S.C. § 2244(d)(2) (emphasis added).

Given that the exhaustion requirement of 28 U.S.C. § 2254(b)(1)(A) remains unchanged by the AEDPA amendments, principles of comity and judicial economy support the Seventh Circuit's interpretation of the statute of limitations in 28 U.S.C. § 2244(d)(1). It simply makes no sense, as a district court on the front lines opined, "to adopt an interpretation of the AEDPA that would require a petitioner to file a § 2254 petition before he exhausted his state remedies." *United States ex rel. Morgan v. Gilmore*, 97 C 4771, 1998 U.S. Dist. LEXIS 9845, at *6 (N.D. Ill. June 24, 1998). The federal district courts should not have to take habeas cases on their dockets while the state courts are still adjudicating post-conviction proceedings, and the state courts should be free to adjudicate them without federal courts exercising habeas jurisdiction at the same time. Thus, the Seventh Circuit's decision in this case reinforces the necessary and compatible interaction between the state courts and federal courts.

At the conclusion of its brief, the State poses an example that supposedly demonstrates "where unfair results would ensue" under the Seventh Circuit's ruling in this case. (Ptn. 14.) After reading the example, however, one is left to wonder how, and to whom, the Seventh Circuit's ruling could be unfair.[3/] The six month difference in that example is not long

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3/ If the comparison intended is between persons who fall strictly under "the limitations period formulation recognized by the Seventh Circuit in *O'Connor* and *Lindh*" (Ptn. 14) and those who would fall under the rule in this case, the difference is dictated by two facts: (1) the federal offenders

enough to be unfair in and of itself. Indeed, before the enactment of the AEDPA petitioners could and often did wait years before filing their habeas petitions, and even though finality was not well served, "fairness" was seldom implicated. When a petitioner's delay causes unfairness to the State in the adjudication of the merits, the habeas court will have discretion to address the fairness issue. *See Lonchar v. Thomas*, 517 U.S. 314, 326-30 (1996) (holding that although ad hoc equitable rulings are generally inappropriate, Rule 9(a) of the Rules Governing § 2254 cases in the United States District Courts provides a ground for dismissal of delayed petitions if the state has been prejudiced in its ability to respond to the petition); *see also Buchanon v. Mintzes*, 734 F.2d 274, 280 (6th Cir. 1984), *cert. granted*, 469 U.S. 1033 (1984), *and cert. dismissed*, 471 U.S. 154 (1985) (finding that a twenty-five year delay before filing a habeas petition prejudiced the state under Rule 9(a) for several of petitioner's claims due to loss of memory, potential witnesses, and records). In the meantime, states concerned about the length of time that post-conviction proceedings pend can take steps to expedite those proceedings, as Illinois has done. *See, e.g.*, 725 ILCS 5/122-1(c) (limiting time for filing post-conviction petition); 5/122-2.1(a) (directing examination of petition by court within 90 days); 5/122-5 (limiting time for filing responsive motions and pleadings).

Recognizing April 24, 1996, as the starting point for the statutory limitations period has several advantages over the State's insistence upon an extended "grace period" for certain cases. This decision is fair. It allows all petitioners, whether

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who would fall under *O'Connor* have no other post-conviction proceedings to pursue and (2) Congress wisely mandated tolling for state prisoners during the pendency of their state post-conviction proceedings.

their conviction became final before or after the enactment of the AEDPA, one full year to file a habeas petition, tolling the time spent during state post-conviction proceedings, as Congress deemed appropriate. Courts can also apply this rule easily. It is undetermined what factors would influence a court to toll the statutory period for some situations; an ad hoc determination by courts could never be applied as evenly as starting the limitations period on April 24, 1996. Finally, if courts had to review whether the "grace period" should be equitably tolled, much time and effort would be spent determining the circumstances of each case and deciding whether the period should be tolled.

CONCLUSION

For these reasons, Petitioner James P. Glass respectfully suggests that this Honorable Court deny the Petition for Writ of Certiorari.

Dated: April 13, 1999

Respectfully submitted,

Barry Levenstam
Counsel of Record
Kendra S. Collier
JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

Counsel for Respondent